2013 IL App (1st)113469-U

FIFTH DIVISION
December 27, 2013

No. 1-11-3469

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KAREN HERRON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County No. 10 CR 22000 Honorable John T. Doody, Jr., Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not establish that she received ineffective assistance of counsel where counsel's decision to not request a limiting instruction regarding defendant's prior convictions and counsel's introduction of and failure to object to certain evidence were part of a reasonable trial strategy and did not prejudice defendant. Defendant's mittimus ordered to be corrected.

¶ 2 Following a jury trial, defendant Karen Herron was found guilty of one count of possession of a controlled substance (cocaine). The trial court sentenced defendant to 30 months' intensive drug probation. On appeal, defendant contends that she received ineffective

assistance of counsel and that she was improperly assessed a $10 Mental Health Court charge.

¶ 3 Prior to defendant's trial, defense counsel filed a motion *in limine* seeking to bar usage of defendant's prior convictions as impeachment evidence should she testify at trial. Defendant indicated that she had a 1998 retail theft conviction, a 2000 attempt theft conviction and a 2005 delivery of a controlled substance conviction. Defendant sought to bar the 1998 and 2000 convictions on the ground that they were misdemeanors that were over 10 years old. Defendant also sought to bar all of the convictions on the ground that the danger of prejudice outweighed the probative value of admitting the convictions. Defense counsel later withdrew the motion because it was discovered that the 2005 conviction was actually for the misdemeanor offense of prostitution and therefore, coupled with the 10-year limit, there were no prior convictions that could be used for impeachment. The case then proceeded to a jury trial, where the following evidence was presented.

¶ 4 On November 16, 2010, the Chicago Police Department set up drug surveillance in the area of 4034 West Wilcox in Chicago, Illinois. Chicago police officer Patrick Kelly was one of the officers working surveillance at that location, which was in an area where there was "a lot of narcotics traffic." Officer Kelly testified that he was hidden in an abandoned building and conducting surveillance through a pair of binoculars. At approximately 1:55 p.m. Officer Kelly observed an individual, later identified as David Perkus, walking back and forth between 4016 and 4034 Wilcox. Perkus then walked to a bucket located on the west side of the building located at 4016 Wilcox, lifted it up and remove small items from it. Perkus walked west on the sidewalk and approached another person who Officer Kelly identified as defendant. Perkus and

defendant spoke briefly and then defendant gave Perkus money in exchange for a small item that Perkus gave to defendant. Based on his experience, training and observations, Officer Kelly believed that that he had observed a narcotics transaction.

¶ 5 Officer Kelly radioed for the nearby enforcement officers to move in and he provided them with the descriptions and location of Perkus and defendant. Ten seconds later he observed one of the two enforcement vehicles drive down Wilcox and stop short of Perkus and defendant, "at which time [defendant] and Perkus fled through the gangway." Officer Kelly then remained in position in case he was needed by the enforcement officers.

¶ 6 Officer Gerardo Perez testified that he and his partner, Officer Leahy, were in the other enforcement vehicle, which was parked a few blocks away from 4034 Wilcox. Officer Perez heard Officer Kelly radio the enforcement officers to approach the 4000 block of Wilcox because he had just observed a suspected narcotics transaction. Officer Kelly also provided the enforcement officers with a description of the two suspects. Officers Perez and his partner approached the area in their vehicle via the north alley of 4000 Wilcox. Upon entering the alley, Officer Perez observed a male, later identified as Perkus, crouching down and putting some items into a tire and a female, who he identified as defendant, walking away from the male. Officer Perez described the weather at this time as cold but clear. As defendant walked past Officer Perez's vehicle, the officer exited and told defendant to stop. From approximately five feet away, Officer Perez then saw defendant drop a small item from her hand. Officer Perez detained defendant by handcuffing her and then he recovered the item that defendant had dropped. The officer described this item as a small Ziploc baggy with a batman logo containing a white chunky

substance that he suspected to be crack cocaine.

¶ 7 Officer Perez also testified that he observed Officer Leahy detain Perkus in the alley and recover the item that he had hid in the tire. Officer Leahy showed that item to Officer Perez, who described it as a plastic bag containing 20 Ziploc baggies with a batman logo, each containing a white chunky substance that he suspected was crack cocaine. Officer Leahy showed Officer Perez another item he recovered from tire, which contained foil packets of suspect heroin.

¶ 8 The parties then stipulated to a proper chain of custody over People's exhibit 4, the small Ziploc baggie that defendant allegedly dropped from her hand. The parties also stipulated that a proper chain of custody was maintained at all times over People's exhibit 5, the suspected narcotics recovered from the tire, which consisted of one plastic bag containing 20 Ziploc bags with batman logos and suspect crack cocaine as well as another plastic bag containing seven foil packets of suspect heroin.

¶ 9 Forensic Chemist Tiffany Neal of the Illinois State Police Forensic Science Center testified that she processed People's exhibits 4 and 5. In Neal's expert opinion, to a reasonable degree of scientific certainty, People's exhibit 4 contained 0.1 gram of cocaine. Neal also weighed and tested 7 of the 20 Ziploc baggies with the batman logos contained in People's exhibit 5. Those seven bags tested positive for 1.1 grams of cocaine. Neal tested two of the seven tin foil packets containing suspect heroin and those packets tested positive for 1.1 grams of heroin.

¶ 10 On cross-examination, Neal testified that there were three inventory numbers associated with the case. The first was people's exhibit 4, which contained .1 gram of cocaine, and the

second was People's exhibit 5, which contained a total of approximately 7.3 grams of narcotics. The following colloquy between defense counsel and Neal then occurred:

"Q. [DEFENSE COUNSEL]: Now, you haven't testified about this yet, but you also tested another group of drugs with another inventory number, correct?"

A. [WITNESS]: Yes

Q. And that was approximately 94 grams worth of drugs; is that right?

[PROCECUTOR]: Judge, the State is objecting to relevance at this point.

[THE COURT]: Overruled.

A. [THE WITNESS]: I would have to total it all up, but trusting your math, approximately, sure.

Q. [DEFENSE COUNSEL]: But approximately that would be about 94 grams. So in your report there is a space for suspect and which inventory numbers are associated with which suspect, correct?

A. Correct.

Q. With respect to [defendant], the inventory number that reflects the one-tenth of one gram is the only one that is associated with my client, correct?

A. According to the documentation that I had, that was the name on the evidence, yes, correct.

Q. The other approximately 100 total grams of drugs related to David Perkus, right?

A. Correct."

¶ 11 The State rested after Neal's testimony. Defendant testified on her own behalf.

According to defendant, at the time she was arrested she was coming from her daughter's father's house and going to the Pulaski Green Line station on Lake Street. Defendant was walking in the alley behind 4034 Wilcox "taking the shortcut to get out of that neighborhood" when someone ran past her and "almost tore [her] shoulder off running." Defendant then saw two police cars. One of them stopped and four officers exited and detained the person who had just ran past defendant. Defendant "saw that there was trouble" and turned around and walked back out of the alley. At that point, the second police car stopped near defendant and an officer ordered her to approach the vehicle. Defendant testified that she "didn't have anything in [her] hand" at that time and that she had not purchased any narcotics that day.

¶ 12 Defendant further testified that the officer, who she later identified as Officer Perez, questioned her as to whether she saw anything and whether she knew the man in the alley who the police had detained. Defendant said that she did not know the man, but Officer Perez insisted that she did. Officer Perez again asked defendant what she saw and where she was going. Defendant again denied knowing the man or having seen anything drug-related and explained to the officer that the man had run into her while she was walking in the alley. According to defendant, Officer Perez used a "violent" and "angry" tone while he questioned her and, when defendant denied knowing the man or having seen anything drug-related, Officer Perez called her a "lying-a** b****." Officer Perez searched defendant, handcuffed her and put her into the squad car. Defendant testified that Officer Perez then joined the other officers, who had been searching the area for approximately 45 minutes. The officers searched a boarded-up house adjacent to the alley. The officers found a "whole big thing full of drugs" in the side paneling of

the house and Officer Perez said, "wow, we hit the jackpot." Defendant testified that Officer Perez told her that he "never really searched the tire." Officer Perez then untied one of the bags, "reached in there and said this is what I got to put on you" and showed defendant a Ziploc bag with a batman logo.

¶ 13 On cross-examination, defendant testified that she was never in front of the 4000 block of Wilcox. After walking down the 4100 block and seeing "too much going on down there," defendant started to head north and entered the alley behind the 4000 block of Wilcox. She further testified that Officer Perez explained to her that he "needed me to look like a buyer in order to put those drugs on [Perkus] to say that he was a seller" in order to arrest him for all of the recovered drugs. Officer Perez also told defendant that the police had been trying to "get those guys" and that she needed to tell the police something. Officer Perez asked defendant who Perkus worked for but defendant said that she did not know anything. The police drove defendant around the area trying to get her to identify people, including Perkus. The officers told defendant they would let her go if she identified someone, but defendant told the police that she would not identify an innocent person.

¶ 14 Defendant further testified on cross-examination that while she was sitting in the squad car, she heard the officers celebrating the narcotics they had found and calling their sergeant to tell him what a good job they had done. When the prosecutor asked defendant if her testimony was that she never had any cocaine in her hand, defendant responded:

> "I promise to God. I didn't have no cocaine. I didn't know this guy. Perez went in one of those - and you know what, in a way I was thanking God because he could have

> gave me more than what he did say. He said this ain't going to be nothing. This is going to be a slap on the wrist. I told him but I don't have no felony background. I did little silly stuff when I was a teenager, but I've turned my life all the way different, differently. And you know, it wasn't about the amount it was, but because of that area, he felt like, you know, a lot of people say they plead guilty and they take the easy charges. But that's not me. I believe in truth. I believe in truth."

¶ 15 The State then requested a sidebar and asked the court to revisit the earlier motion in limine regarding impeaching defendant with her prior convictions if she lied under oath. The State argued:

> "She's saying that she was a juvenile at that point, and in the year 2000, if she is 44 years old now today, she was 34, and she had a conviction for theft. Even though it was a misdemeanor, it's something probative of her credibility. And she's now getting up in front of the jury saying she doesn't have a background and essentially bolstering her own credibility. *** It's just our position that she disavowed any kind of criminal history at all, whatsoever since she was a teenager and as a juvenile."

Defense counsel argued that there was no need to admit the misdemeanor convictions because the State was not prejudiced by defendant's testimony but that the defense would stipulate to the theft conviction if a cure was necessary. The trial court pointed out that defendant told the truth about having no prior felonies but that defendant was not a teenager in 2000 or 2005 and that the State had a right to impeach that false statement. The parties agreed to work out a stipulation and then defense counsel stated:

> "I would object to the prostitution. I think the impeachment is accomplished with the theft alone. They are both misdemeanors. The prostitution is highly prejudicial, and I think it would be inappropriate. I think everything the State seeks to accomplish in terms of impeachment can be done with the one misdemeanor. I think the prostitution is not necessary."

The State responded that because defendant had disavowed any adult convictions, it had the right to impeach defendant with the prostitution conviction as well. The trial court indicated that it agreed. Defense counsel asked the court if they could just indicate that defendant had two misdemeanor convictions without stating what they were for, arguing that counsel understood the theft conviction but that counsel "would prefer to keep the nature of the charge of the prostitution without being [*sic*] mentioned." The court stated that while mere fact impeachment was inadmissible, the parties could agree to stipulate to whatever they wanted. The parties agreed to stipulate that defendant had a 2000 misdemeanor theft conviction and another misdemeanor conviction from 2005. The State then indicated that it had completed its cross-examination of defendant. On redirect, defendant testified that she had a 2000 attempt theft conviction and another misdemeanor conviction from 2005. The defense then rested.

¶ 16 The State called Officer Perez in rebuttal. He essentially denied the statements attributed to him by defendant during her testimony.

¶ 17 During the State's closing rebuttal argument, brought up the impeachment evidence as follows:

> "And you saw the testimony and the demeanor of the defendant as she took the

stand. She raised her hand she swore to tell you the truth. What did she do? She lied to you. Because she got up there and she also - and you heard her say that she hadn't done anything wrong, actually, since she was a juvenile. No problem. You know, because that was when Officer Perez was trying to get her to plea to something or plea to some lesser charge. Because, you know, it wasn't enough that they had recovered all of this and had another arrest. It wasn't enough. So upset.

And then you heard her then get up there and say, yeah, you know what, you're right. I did have those two other convictions. So right then and there she's saying one thing to you, and then when forced to tell the truth, that's when she does it. And if you can't believe her about some things, then what else does that say about the rest of her testimony."

¶ 18 The jury found defendant guilty of possession of less than 15 grams of a controlled substance. The trial court sentenced defendant to 30 months' intensive drug probation and imposed fees and costs in the amount of $1,190.00 minus $135 credit for time served for a total of $1,055.00. Defendant said that she did not understand the fees and costs, and the trial responded:

"There are fees and costs required by law. The Court is not making any fines against you, but there are certain required fees and costs by the legislature, and that will be indicated on there, and your counsel will explain what that means. The Court has no jurisdiction to change that."

¶ 19 Defendant now appeals her conviction and one of the charges imposed against her.

¶ 20 Defendant first contends that she received ineffective assistance of counsel. Defendant claims that counsel was ineffective because she failed to tender a limiting instruction regarding how the jury could consider the evidence of defendant's prior convictions and because counsel failed to prevent the introduction of irrelevant and prejudicial evidence.

¶ 21 Claims of ineffective assistance of counsel are resolved by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Id*. at 687. Defendant must satisfy both prongs of this test in order to prove ineffective assistance of counsel. *Id*.

¶ 22 To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). When reviewing a claim of ineffective assistance of counsel, a court must consider counsel's conduct as a whole and not merely focus on isolated incidents. *People v. Max*, 2012 IL App (3d) 110385, ¶65. Additionally, matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). A "strong presumption" exists that the challenged action or inaction of counsel was a matter of sound trial strategy and a defendant can overcome that presumption only by showing that counsel's decision was "so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *People v. Jones*, 2012 IL App (2d) 110346, ¶82; *People v. Patterson*, 217 Ill. 2d 407, 441 (2005) (matters of trial strategy will generally not support a claim of ineffective assistance unless counsel failed to conduct any

meaningful adversarial testing).

¶ 23 In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Put another way, defendant must show that "counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 24 Defendant claims that her counsel was ineffective for failing to tender a limiting instruction, such as IPI Criminal 4th No. 3.13, that would have informed the jury as to how it could consider the evidence of defendant's prior convictions. IPI Criminal 4th No. 3.13 provides:

> "Evidence of a defendant's previous conviction of an offense may be considered by you only as it may affect [her] believability as a witness and must not be considered by you as evidence of [her] guilt of the offense with which [she] is charged." IPI Criminal 4th No. 3.13.

Defendant asserts that without such an instruction, the jury was not apprised of the limited purpose for which defendant's prior convictions could be considered and may have considered those convictions as evidence of defendant's guilt. We disagree.

¶ 25 First, defendant has failed to overcome the presumption that counsel's decision to not request the limiting instruction was part of a reasonable trial strategy. "It is well settled in Illinois that counsel's choice of jury instructions, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy." *People v. Sims*, 374 Ill. App. 3d 231, 267

(2007). Moreover, the decision to forego tendering a limiting instruction to avoid highlighting evidence of a defendant's prior convictions has been found to be a reasonable trial strategy that will not support an ineffective assistance of counsel claim. See *People v. Jackson*, 391 Ill. App.3d 11, 34 (2009) ("Defense counsel's choice not to seek a limiting instruction regarding other crimes evidence was purely a strategic decision made so as not to emphasize the evidence which, while proper, portrayed defendant in a bad light. Therefore, defense counsel's tactical decision cannot be the subject of a claim of ineffective assistance"); *People v. Logan*, 2011 IL App (1st) 093582, ¶51 (defense counsel was not ineffective for failing to tender a limiting instruction where counsel made a strategic decision not to do so to avoid having the jury focus its attention on certain polygraph evidence); *People v. Perez*, 2012 IL App (2d) 100865, ¶66 (trial counsel's decision of whether to request a limiting instruction may be viewed as strategic).

¶ 26 Additionally, courts have found that it is prejudicial error to give IPI Criminal 4th No. 3.13 over defense counsel's objection. For example, in *People v. Fultz*, 2012 IL App (2d) 101101, ¶69, the appellate court found that it was prejudicial error for the trial court to give IPI Criminal 4th No. 3.13 where defense counsel objected to the instruction on the ground that it would highlight the defendant's prior conviction to the jury. The court also found that the error was not harmless, noting that the evidence exclusively concerned a credibility contest between the defendant and a testifying police officer. *Id*. ¶74. Similarly, in *People v. Gibson*, 133 Ill. App. 2d 722, 726 (1971), the court found prejudicial error in the trial court giving IPI Criminal 4th No. 3.13 at the State's request. In so doing, the court rejected the State's argument that the instruction serves only to benefit a defendant and stated:

> "It should be the prerogative of the defendant to determine whether such an instruction is beneficial to his defense or whether it would only serve to accentuate his past criminal record. To use or to not use such an instruction is a matter which is to be determined by the defendant or the trial court on its own motion, and not by the People." *Id*.

¶ 27 We recognize that these cases involve the issue of the trial court giving IPI Criminal No. 3.13 either at the State's request or over defense counsel's objection, an issue not involved in this appeal. Nevertheless, these decisions support and illustrate the principle that the decision whether to request a limiting instruction is a matter of trial strategy that will generally not support a claim of ineffective assistance of counsel.

¶ 28 In this case, defense counsel could have reasonably concluded that requesting the instruction would have only highlighted defendant's convictions for the jury. This case came down to two competing versions of events and the outcome of the case turned on the credibility of the witnesses. On one hand, the testimony of the State's key witnesses, Officers Perez and Kelly, was strong and was not impeached in any meaningful way. On the other hand, defendant's credibility had already been damaged and her prior convictions had been highlighted when she testified that she was a juvenile when she was convicted of certain offenses and that testimony was then impeached by the fact that she was convicted of theft and another misdemeanor when she was an adult. Under these circumstances, defense counsel could have concluded that the limiting instruction would have further emphasized defendant's prior convictions to the jury and caused greater damage to her credibility. Counsel's decision was therefore part of a reasonable

trial strategy that will not support a claim of ineffective assistance of counsel.

¶ 29 We also must view defense counsel's conduct as a whole and not focus solely on counsel's decision to not request a limiting instruction. In that context, we note that counsel argued effectively that the prostitution conviction was highly prejudicial and ultimately was able to have that conviction referred to as a misdemeanor from 2005. Counsel was therefore able to reduce the prejudicial nature of that conviction. Counsel's arguments to the court about defendant's prior convictions also demonstrate that counsel was aware that those convictions could damage defendant's credibility, which further supports our finding that counsel's decision to not request a limiting instruction was a matter of trial strategy. For all of these reasons, we conclude that defendant has failed to carry her burden under the first prong of *Strickland* and demonstrate that counsel's performance fell below an objective standard of reasonableness.

¶ 30 We also find that defendant has failed to establish that she was prejudiced by counsel's decision to not request a limiting instruction. The evidence of defendant's guilt was strong. As noted above, the testimony of the State's witnesses was not impeached in any meaningful way. Officer Kelly testified credibly that he witnessed Perkus take a small item out of the bucket, walk to defendant, and then hand that item to defendant in exchange for money. Officer Kelly then radioed his enforcement team, who quickly arrived on the scene. Officer Perez corroborated Officer Kelly's testimony when he testified that Perkus and defendant were found in the back alleyway after fleeing and that defendant dropped a small item on the ground once confronted by the police. The substance inside the item dropped by defendant as well as some of the items that police saw Perkus place into the tire tested positive for cocaine and the logo on the bag that

defendant dropped was the same as the logos on the bags of cocaine found in the tire. In light of this evidence, the result of defendant's trial would not have been different even if counsel had requested the limiting instruction. Additionally, the instruction could have hurt defendant's case by emphasizing her prior convictions to the jury and thereby further damaging defendant's credibility. Finally, the prosecution made only a brief reference to the impeachment evidence in rebuttal and argued that evidence solely in context of its affect on defendant's credibility. The prosecution did not use the prior convictions to imply that defendant had a propensity to commit crime or to suggest to the jury that it should consider those convictions as evidence of defendant's guilt. For these reasons, we conclude that defendant has failed to show that counsel's performance rendered the result of defendant's trial fundamentally unfair or that, but for counsel's alleged error, the result of the trial would have been different. Accordingly, defendant has failed to meet her burden under both prongs of the *Strickland* test.

¶ 31 Defendant next claims that trial counsel was ineffective for failing to prevent the introduction of evidence of other, larger quantities of drugs that defendant claims were not connected to the charges against her. Defendant specifically complains about the admission of People's Exhibit 5, the drugs recovered from the tire, and the solicited testimony of forensic chemist Neal regarding the additional 94 grams of cocaine not admitted into evidence.

¶ 32 "[E]vidence of other crimes is not admissible merely to show how the investigation unfolded unless such evidence is also relevant to specifically connect the defendant with the crimes for which [she] is being tried." *People v. Lewis*, 165 Ill. 2d 305, 346 (1995). Testimony that is part of a continuing narrative of the events surrounding the charge is proper, and the

determination as the proper scope rests within the discretion of the trial court. *Jackson*, 391 Ill. App. 3d at 33-34.

¶ 33 We find that defense counsel was not ineffective for failing to object to People's Exhibit 5 because that evidence was admissible. Defense counsel is not required to make futile motions and cannot be ineffective for failing to object to properly admitted evidence. *Id*. at 34; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lundy*, 334 Ill. App. 3d 819, 830 (2002). Here, People's exhibit 5 was admissible as part of the narrative of the events that lead to defendant's arrest and the steps taken by the police in the investigation of the offense. People's exhibit 5 was also admissible because it connected defendant to the narcotics that she allegedly dropped and it rebutted defendant's claim that she did not purchase cocaine or drop the baggie of cocaine from her hand. People's exhibit 4, the baggie of cocaine that defendant allegedly possessed, had the same "batman" logo that was on the baggies of cocaine in People's exhibit 5. People's exhibit 5 therefore connected defendant to the drugs that the police saw Perkus place in the tire. Connecting the baggie of cocaine that defendant allegedly dropped to the baggies of narcotics that police saw in Perkuks's possession supported the State's evidence that defendant had just purchased narcotics from Perkus. Therefore, because People's exhibit 5 was admissible evidence, defense counsel was not ineffective for failing to object to its admission.

¶ 34 We also find that defense counsel could have questioned forensic chemist Neal about the 94 grams of recovered narcotics as part of a reasonable trial strategy. Defense counsel's theory of the case was that defendant was just an innocent passerby in an area of high narcotics trafficking, that the police had been trying to arrest Perkus and other drug sellers in the area and that the

police planted the cocaine on defendant because she would not "finger" Perkus for the drugs recovered by the police or provide the police with any other information. Defendant testified extensively to this theory on direct and cross-examination. Defense counsel pursued this theory throughout the case, including during opening and closing arguments. Counsel's theory of the case was reasonable and one of the few viable explanations that would have exonerated defendant. The evidence of the larger stash of narcotics supported the theory that the police were hoping to arrest Perkus for selling narcotics which, in turn, strengthened the inference that the police planted narcotics on defendant in order to do so. Although this strategy proved unsuccessful, "the reasonableness of counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, and without hindsight, in light of the totality of circumstances, and not just on the basis of isolated acts." *People v. Nowicki*, 385 Ill. App. 3d 53, 82 (2008). Additionally, when considering whether defense counsel's performance fell below an objective standard of reasonableness, the test is not whether one lawyer would choose a different strategy, but that no reasonable lawyer would have chosen the strategy used. *People v. Jones*, 2012 IL App (2d) 110346, ¶83.

¶ 35 Moreover, after defense counsel questioned Neal about the larger quantity of recovered narcotics, counsel immediately distanced defendant from those narcotics and made clear that they were only connected to Perkus. Counsel's efforts to distance defendant from the large quantity of recovered narcotics and to tie those narcotics to Perkus supports our conclusion that counsel elicited the testimony about them as part of trial strategy. Counsel did not carelessly elicit testimony about the those narcotics but, instead, counsel confirmed that those drugs were not

related to defendant and placed their recovery into the larger context of the defense theory of the case. For these reasons, defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness.

¶ 36 Defendant has also failed to show that she was prejudiced when defense counsel elicited the testimony from Neal about the 94 grams of recovered narcotics. First, as noted, defense counsel distanced defendant from those narcotics and made clear that they were only connected to Perkus. Second, as also noted above, the evidence of defendant's guilt was strong and defendant would have still been found guilty even if counsel had not questioned Neal about the 94 grams of narcotics. For both of these reasons, defendant has not established that the result of her trial would have been different had counsel not elicited testimony about the large amount of recovered narcotics. Accordingly, defendant has again failed to meet her burden under both prongs of the *Strickland* test. Therefore, defendant has not established that she received ineffective assistance of counsel.

¶ 37 Lastly, defendant contends that she was improperly assessed a $10 Mental Health Court charge. Defendant claims that the trial court intended to impose only mandatory fees and that the Mental Health Court charge is not statutorily mandated. Therefore, defendant, claims, the court's oral pronouncement conflicts with the mittimus imposing the Mental Health Court charge against defendant and the mental health charge should be vacated. See *People v. Lane*, 2011 IL App (3rd) 080858, ¶24 ("When a conflict exists between the common-law record and the report of proceedings, a court must give the report of proceedings precedence"). The State agrees with defendant.

¶ 38 The statute authorizing the Mental Health Court charge provides:

> "A county board may enact by ordinance *** the following fines:
>
> * * *
>
> (d-5) A $10 fee to be paid by the defendant on a judgment of guilty or a grant of supervision under Section 5-9-1 of the Unified Code of Corrections to be placed in the county general fund and used to finance the county mental health court, the county drug court, the Veterans and Servicemembers Court, or any or all of the above." 55 ILCS 5/5-1101(d-5) (West 2010)

This fee has been enacted in Cook County as section 8-36 of the Cook County Code of Ordinances (the County Code) as follows:

> "The Clerk of the Circuit Court of the County *is authorized to collect* a $10.00 fee to be paid by the defendant on a judgment of guilty or a grant of supervision under Section 5-9-1 of the Unified Code of Corrections. Such fee is to be placed in the county general fund and used to finance the County Mental Health Court." (Emphasis added.) Cook County Code §18-36 (2005).

¶ 39 Section 18-36 states that the clerk of the circuit court is "*authorized to collect*" a mental health court charge, which implies that the charge is discretionary, while other sections of the County Code use the phrase "shall collect," implying a mandatory fee. See, *e.g.*, County Code §18-37 (Emphasis added.) (entitled "Fee to finance Peer or Teen Court" and stating that the "Clerk of the Circuit Court of the County shall collect a mandatory fee ***."); County Code §18-38 (Emphasis added.) (entitled "Drug court fee" and stating "the Clerk of the Circuit Court

of Cook County shall collect a mandatory fee of $5.00 to be assessed as provided in this section").

¶ 40 Given the permissive language of section 18-36, we agree with the parties that the mental health charge is discretionary and we also agree that the trial court's oral pronouncement indicates that the court only intended to impose mandatory fees. This court has the authority to order a correction of a mittimus. See S. Ct. R. 615(b)(1). Accordingly, we order the clerk of the circuit court to correct defendant's mittimus by deleting from it the $10 Mental Health Court charge.

¶ 41 For the reasons stated, we affirm the judgment of the circuit court of Cook County and order that defendant's mittimus be corrected.

¶ 42 Affirmed; mittimus corrected.